Office-Supreme Court, U.S.
FILED
JUN 14 1983
ALEXANDER L. STEVAS,
CLERK

83-60

MISCELLANEOUS NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

S. J. SMITH ..... PETITIONER

V.

UNITED STATES OF AMERICA ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES J. VARELLAS
Suite 400, Limestone Building
134 North Limestone
Lexington, Kentucky 40507
Telephone: (606) 252-4473

Attorney for Petitioner

PRINT MASTER, INC., 939 LANE ALLEN RD., LEXINGTON, KY. 40504, PH. (606) 278-0341

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

MISCELLANEOUS NO. _____

S. J. SMITH ..... PETITIONER

V.

UNITED STATES OF AMERICA ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MAY IT PLEASE THE COURT:

Comes S. J. Smith, by counsel, pursuant to Part V of the Rules of the Supreme Court and petitions the Supreme Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the Order and Judgment of the United States Court of Appeals for the Sixth Circuit entered and filed April 6, 1983, and in support thereof states as follows:

a) The questions presented for review are:

I. Whether the Fourth Amendment permits a finding of probable cause for a search warrant issued upon a police affidavit where every material portion of the affidavit is proven false by the evidence and subsequent testimony of the police officers who obtain and execute the search warrant?

II. Whether the Government should be compelled to disclose the identity of a confidential informant where the police testimony reveals strong probability that no such informant exists, making the identity of the informant essential to a fair determination as to the existence of probable cause for issuance of a search warrant?

b) The caption of the case in this Court includes the names of all parties to the proceeding in the Court whose judgment is sought to be reviewed.

c)
1)

TABLE OF CONTENTS

	Page
Questions Presented for Review	ii
List of Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	iv
Reference to Opinions in the Court Below	1
Statement of Jurisdictional Grounds	1
Constitutional Provisions, Statutes, Rules	1-2
Statement of the Case	2-7
Basis for Federal Jurisdiction	3-4
Argument	7-13
Certificate of Service	14
Appendix	1a-15a

2)

TABLE OF AUTHORITIES

CASES: Page

Franks v. *Delaware*,
438 U.S. 154, 155-156 (1978) 7, 9, 10

McCray v. *Illinois*,
3tution 10, 13

d) No opinion was delivered by the District Court. The opinion of the Court of Appeals for the Sixth Circuit is not officially reported and is copied and included in the Appendix at Pages 6a-14a.

e) The Supreme Court has jurisdiction of this petition and case. The judgment sought to be reviewed was filed and entered April 6, 1983. A petition for rehearing *en banc* was timely filed in the Court of Appeals for the Sixth Circuit and denied by order filed and entered May 18, 1983. No extension of time within which to petition for certiorari has been requested or granted, and this petition will be filed within sixty (60) days after entry of the order denying the petition for rehearing *en banc*.

The Supreme Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

f) The constitutional provision involved is the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Petitioner was charged and convicted of the violation of 21 U.S.C. §841(a)(1), which provides:

> Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

g) **Statement of the Case.**

On January 6, 1982, an indictment was returned and filed in the United States District Court for the Eastern District of Kentucky, charging the Petitioner, S. J. Smith, with three counts of possession of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1). The evidence against Mr. Smith was obtained as a result of a search of his farm near Gratz, Owen County, Kentucky, on October 27, 1981.

The search was conducted pursuant to a search warrant issued October 27, 1981, at 4:00 p.m. in Owenton, Kentucky, by a District Judge of Owen County, Kentucky. The warrant was issued upon the request and sworn affidavit of Kentucky State Police Detective Brian Finney, who stated in his affidavit that he had received information from both Kentucky State Police Trooper Dennis Sharon and a confidential informant that Mr. Smith possessed marijuana on his property.

Based upon Finney's affidavit, a warrant authorizing the search of S. J. Smith's property was issued. The police officers executing the warrant

found three separate quantities of marijuana on Mr. Smith's property, with 660 pounds in a metal barn, 12 pounds in a camper and 4 pounds in an automobile trunk. Consequently, Mr. Smith was indicted on three separate counts of possession of marijuana with intent to distribute. Mr. Smith's counsel moved the trial court to suppress the evidence for lack of probable cause for the search and to compel the Government to disclose the identity of its alleged confidential informant, but the trial court overruled both motions after a suppression hearing was held March 2, 15 and 16, 1982.

On September 10, 1982, Mr. Smith was convicted on all three counts of the indictment and sentenced to the maximum of five years imprisonment on each count, to run concurrently, with a $10,000 fine for conviction under Count I relating to the 660 pounds of marijuana found in the barn. Mr. Smith appealed to the U.S. Court of Appeals for the Sixth Circuit, alleging that the trial court erred in overruling the motions to suppress evidence and to compel disclosure of the alleged informant's identity, in violation of the Fourth Amendment and contrary to the law as stated in *Franks* v. *Delaware*, 438 U.S. 154, 155-156 (1978) and *Roviaro* v. *United States*, 353 U.S. 53 (1957). On April 6, 1983, the Court of Appeals entered an order affirming Mr. Smith's conviction and sentence.

Mr. Smith now petitions this Court for review of the decision of the Court of Appeals, which rejected

his contentions that the search warrant should have been set aside for lack of probable cause or, in the alternative, that the Government should have been compelled to disclose the identity of the alleged confidential informant. Mr. Smith's contentions are based upon the discrepancies appearing on the face of the affidavit and search warrant, and upon the testimony of the police officers involved in the procurement and execution of the search warrant, namely, Detective Brian Finney, Detective Ben Hadley, Trooper Bobby Downey and Trooper Dennis Sharon.

In Detective Finney's affidavit, which was signed by him in the presence of the Owen District Clerk in Owenton at 4:00 p.m., Detective Finney stated:

> On the 27th day of October, 1981, at approximately 4:00 p.m., affiant received information from a confidential and reliable informant . . . Informant advised the Affiant on the 27th day of October, 1981 on said S. J. Smith property that on the 21st day of October, 1981 he observed a large quantity of marijuana in the above described house and that Mr. Smith advised he had in his possession a large quantity of marijuana for sale . . . In conversation with Tpr. Dennis Sharon U/819 of the Ky. State Police he advised that a quantity of marijuana was being cultivated on Smith's property . . .

At the suppression hearing, Detective Finney testified that S. J. Smith's name was never revealed to

him until the unidentified informant gave him Mr. Smith's name on October 27, 1981, at approximately 4:00 p.m., when Detective Finney contacted the informant from a telephone at a gas station in Gratz, Kentucky. Detective Finney further testified that, as stated in his affidavit, Kentucky State Police Trooper Dennis Sharon had advised him that marijuana was being cultivated on Mr. Smith's property. When asked whether Trooper Sharon had told him how he knew marijuana was being cultivated on Mr. Smith's property, Detective Finney replied, "Yes, sir. I believe he stated that he and some other peace officers had destroyed some marijuana on the S. J. Smith property."

Trooper Dennis Sharon testified at the suppression hearing that he did not know S. J. Smith and that he had never been on property belonging to S. J. Smith.

Kentucky State Police Trooper Bobby Downey testified that on October, 27, 1981, at approximately 2:30 or 3:00 p.m., Detectives Ben Hadley and Brian Finney contacted him by radio while the detectives were en route from Carrolton, Kentucky to Owen County. Officer Downey, who was near Gratz at the time, testified that the detectives requested him to meet them on Kentucky Highway 355, and asked if he knew S. J. Smith and whether he thought Mr. Smith was home. The detectives told Trooper Downey they wanted permission to search Mr. Smith's farm, and then went directly to the farm to request permission.

When Mr. Smith denied permission, Finney and Hadley travelled to Owenton to obtain the search warrant and then returned to execute the warrant.

Detective Ben Hadley, who was working with Detective Finney on the day of the search, testified that he and Finney travelled from Carrolton to Gratz for the purpose of searching S. J. Smith's property, and that Finney told him before they arrived in Gratz that an informant had advised him that Mr. Smith had marijuana on his property. Detective Hadley testified that the trip from Gratz to Owenton took 15 to 20 minutes, that he was present when the warrant was issued in Owenton at 4:00 p.m., and that he watched Detective Finney write out the affidavit in the judge's chambers in Owenton.

Detective Finney testified that the trip from Owenton to Gratz took approximately 15 to 20 minutes and that he wrote about three-fourths of the affidavit in the car as Detective Hadley drove from Gratz to Owenton to obtain the search warrant. Detective Finney also testified that Mr. Smith's brother, who had been arrested for possession of marijuana, had a metal barn similar to the barn on Mr. Smith's property where the marijuana was found.

The final discrepancy relied upon by Mr. Smith was that although Detective Finney testified he received Mr. Smith's name from an informant while at a telephone in Gratz, his affidavit states that he

received Mr. Smith's name from the informant while on Mr. Smith's property at approximately 4:00 p.m.

j) **Argument in Support of Petition for Writ of Certiorari**

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S DECISION IN *FRANKS V. DELAWARE*.

As stated in *Franks* v. *Delaware*, 438 U.S. 154, 155-156 (1978):

> "... In the event that at (the suppression) hearing the allegation of perjury or reckless disregard is established by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

Detective Finney recited in his affidavit that he received his information that Mr. Smith possessed marijuana from a confidential informant while in Gratz, Kentucky, on October 27, 1981, at approximately 4:00 p.m. Detective Finney testified at the suppression hearing that at approximately 4:00 p.m., he contacted his supposed informant from a telephone at a gas station in Gratz, Kentucky, and that it was at that time his informant first revealed Mr. Smith's name. Despite Detective Finney's testimony, Detec-

tive Ben Hadley testified that on October 27, 1981, he and Detective Finney travelled from Carrolton to Gratz for the specific purpose of searching the farm of S. J. Smith, and that Detective Finney told him even before they arrived in Gratz that an informant had advised him that Mr. Smith had marijuana on his property.

Kentucky State Police Trooper Bobby Downey testified that on October 27, 1981, Detectives Finney and Hadley contacted him by radio as early as approximately 2:30 or 3:00 p.m. while the detectives were en route from Carrolton to Owen County, requesting that he meet them on Kentucky Highway 355 and asking if he knew S. J. Smith. Detectives Finney and Hadley asked Trooper Downey whether Mr. Smith was home because they wanted permission to search his farm. Officer Downey testified that he met the detectives on Highway 355 and then proceeded with them directly to Mr. Smith's farm. Thus, it became clear at the suppression hearing that the two detectives were planning their search of Mr. Smith's farm long before Detective Finney could have obtained Mr. Smith's identity from any alleged informant while speaking from a telephone in Gratz at approximately 4:00 p.m., as alleged in Detective Finney's affidavit, and that the allegations in the affidavit were completely false.

Similarly, although Detective Finney testified that he received his information while at a gas station in Gratz at approximately 4:00 p.m., his affidavit

states unequivocally that he received his information from the informant at approximately 4:00 p.m. while on S. J. Smith's property, and yet the affidavit was signed in Owenton at 4:00 p.m. and the warrant issued in Owenton at 4:00 p.m. Both Detectives Hadley and Finney admitted there was a 15 or 20 minutes distance between Gratz and Owenton and that it took Finney approximately 15 minutes to complete his affidavit. While Finney testified he completed three-fourths of the affidavit in the car on the way to Owenton, Hadley testified that he watched Finney write the affidavit in the judge's chambers in Owenton.

Trooper Dennis Sharon testified he did not know S. J. Smith and had never been on Mr. Smith's property, despite Finney's assertions that Trooper Sharon had advised that marijuana was being cultivated on Mr. Smith's property, and that Sharon and other officers had previously destroyed marijuana on Smith's property.

The Court of Appeals recognized that Finney's allegations as to Trooper Sharon were false or erroneous, but ruled that the remainder of the affidavit was sufficient to establish probable cause for the search warrant. Under the mandate of *Franks, supra*, this ruling was clearly erroneous. The Court of Appeals ignored the numerous inconsistencies relating to the existence of the confidential informant, and ignored the total absence of any evidence on the part of the Government to explain the inconsistencies. Under

Franks, a defendant need only prove by a preponderance of the evidence that false or erroneous information was included in the affidavit for search warrant with a deliberate or reckless disregard for the truth. Once this showing is made, each portion of the affidavit containing such false or erroneous information must be set aside.

A clear showing was made by at least a preponderance of the evidence—in fact, by all of the evidence, that the allegations in Finney's affidavit as to both Trooper Sharon and the confidential informant were false or erroneous and included with a deliberate or reckless disregard for the truth. The Court of Appeals has erroneously disregarded the mandate of *Franks* by failing to set aside those portions of the affidavit in the determination as to the existence of probable cause for issuance of the search warrant. Hence, the Petitioner respectfully requests this Court to grant certiorari and rule upon the issues involved so that uniformity of law may be maintained and Fourth Amendment rights preserved.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH *ROVIARO* V. *UNITED STATES*.

This Court ruled in *Roviaro* v. *United States*, 353 U.S. 53 (1957) that where the disclosure of an informer's identity, or the contents of the communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the Government's privilege to withhold the identity of confidential informants must give way. See also *McCray* v. *Illinois*, 336 U.S. 300 (1967). Similarly, this Court stated in *Scher* v. *United States*, 305 U.S. 251 (1938) that an officer's good faith is a circumstance essential to the defense of an accused and disclosure of the identity of an informant should be required where the officer's good faith is at issue.

The grave discrepancies as to how and when Detective Finney allegedly received Mr. Smith's name from his alleged informant, in conjunction with the revelation that both Detective Finney's affidavit and later testimony were completely false as to information received from Trooper Dennis Sharon, certainly called into question the good faith and veracity of Detective Finney. Although this Court has never further defined the circumstances entitling a defendant to compel disclosure of an informant's identity for the fair determination of a cause, the discrepancies in this case should certainly place Mr. Smith within the protective bounds of *Roviaro* and *Scher*.

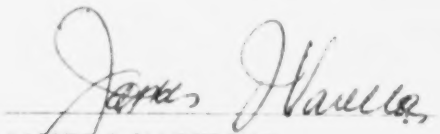
The Court of Appeals, like the trial court, erroneously failed to recognize that, given the numerous discrepancies in the testimony, Mr. Smith was entitled to disclosure of the alleged informant's identity once the trial court refused to set aside the search warrant for lack of probable cause. The alleged informant was the only person who could verify that Detective Finney did in fact receive Mr. Smith's name from an informant and that Finney was not fabricating testimony and acting solely upon suspicion based upon his knowledge that Mr. Smith's brother, who had a metal barn similar to that of Mr. Smith, had been arrested for possession of marijuana.

The Court of Appeals acknowledged that an *in camera* procedure to insure the existence of an informant would have been helpful in this case, but decided that neither an *in camera* examination nor disclosure of the informant's identity was necessary, despite the great inconsistencies and contradictions in the police testimony. The Petitioner asserts that the rulings in *Roviaro* and *Scher* were intended to preclude a police officer from espousing the existence of a confidential informant without being able to support his allegations with consistent testimony. When it appears, as it did in this case, that the allegations as to a confidential informant are false, the Government should be compelled to make the informant available for cross examination by the defendant, or at least make the informant available for an *in camera* examination by the

court. To refuse to do so is contrary to this Court's decisions in *Roviaro* and *Scher*, and contrary to the Fourth Amendment's protection against unreasonable search and seizure.

Mr. Smith clearly established by at least a preponderance of the evidence that Detective Finney's allegations as to both Officer Sharon and the alleged confidential informant were false or erroneous. This showing should have been held sufficient to require the Government to disclose the identity of the alleged confidential informant, and the Petitioner respectfully urges this Court to grant certiorari and rule on the issues presented herein.

Respectfully submitted,



JAMES J. VARELLAS
Suite 400, Limestone Building
184 North Limestone
Lexington, Kentucky 40507
Telephone: (606) 252-4473

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of July, 1983, three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C., 20530; Hon. John P. Hehman, Clerk, United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio, 45202; and Hon. Louis DeFalaise, United States Attorney, Federal Building, Box 1490, Lexington, Kentucky, 40591. I further certify that all parties required to be served have been served.

James J. Varellas

JAMES J. VARELLAS
Attorney for Petitioner

United States District Court for
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

United States of America vs.
DEFENDANT — S. J. SMITH DOCKET NO. 82-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date at Lexington — September 10, 1982.

COUNSEL

X WITH COUNSEL — James Varellas and Ed Cooley

PLEA

X NOT GUILTY — Counts 1, 2 & 3

FINDING & JUDGMENT

There being a verdict of X GUILTY. — to Counts 1, 2 & 3

Defendant has been convicted as charged of the offense(s) of Unlawfully, knowingly and intentionally possess with intent to distribute Schedule I Controlled Substance (Marihuana) in violation of Title 21, Section 841(a)(1) United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was

shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on Count One and Fine of $10,000.00 and Costs of Thirty Five ($35.00) Dollars, defendant to stand committed for payment of fine and costs, FIVE (5) YEARS on Count Two, FIVE (5) YEARS on Count Three.

Imprisonment on the above sentences to be served concurrently and are to be followed by Special Parole of Three (3) Years.

SPECIAL CONDITIONS OF PROBATION

A presentence report was submitted to the Court before imposition of sentence and copies were furnished to counsel, pursuant to Rule 32, F.R.Cr.P.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
THIS DATE 9-10-82
By /s/ Ruby V. Hill, Deputy

SIGNED BY
X U.S. District Judge
Bernard T. Moynahan, Jr., Judge
Date Sept. 1982

* * * * * * *

Eastern District of Kentucky
FILED
MAR 17 1982
AT LEXINGTON
DAVIS T. McGARVEY
CLERK, U.S. DISTRICT COURT

NOTICE IS HEREBY GIVEN OF
THE ENTRY OF THIS ORDER
OR JUDGMENT ON 3-17-82
DAVIS T. MC GARVEY, CLERK
BY: /s/ Ruby V. Hill D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CRIMINAL 82-1

UNITED STATES OF AMERICA PLAINTIFF

V.

S. J. SMITH DEFENDANT

O R D E R

On March 15, 1982, at Lexington, came the United States by John M. Compton, Assistant United States Attorney, the defendant in person and by his attorneys, James Varellas and Edward Cooley.

The Court heard counsel on the defendant's Motion to Suppress, testimony on behalf of the defendant was begun but not concluded at hour of adjournment.

On motion of counsel for the defendant, witnesses, Bobby Downey, Robert Perkins and Ben Hadley, subpoenaed on behalf of the defendant, were

recognized in the penal sum of $1000.00 for their appearance on March 16, 1982 at 9:30 A.M. Thereupon a recess until 9:30 A.M. on March 16, 1982 was announced.

On March 16, 1982, came the parties and their respective counsel as before the recess. The introduction of evidence on behalf of the United States was introduced. The Court heard counsel and being advised, it was ORDERED that the defendant's Motion to Suppress be and it is overruled.

The Court heard counsel on the remaining pending motions and it was ORDERED:

1. That the defendant's Motion To Make Available Identity of Informant be and it is overruled.

2. That the defendant's Motions for Order Directing United States to Make Available to Independent Chemist Sample of Alleged Marihuana and To Specify Source of Alleged Marijuana Received by United States Customs on November 4, 1981 were overruled as moot upon statement of counsel for the United States that it would furnish said information.

It was further ORDERED that this case be and it is assigned for Jury Trial on Tuesday, May 25, 1982 at 9:30 A.M. at LEXINGTON.

This the 17th day of March, 1982.

/s/ Bernard T. Moynahan, Jr.
Bernard T. Moynahan, Jr., Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Ruby V. Hill D.C.

* * * * * * * *

NOT FOR PUBLICATION

FILED
APR - 6 1983
JOHN P. HEHMAN, Clerk

NO. 82-5565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

S. J. SMITH,
Defendant-Appellant.

O R D E R

Before: MARTIN and WELLFORD, Circuit Judges; GILMORE, District Judge.*

Defendant-appellant appeals from his jury conviction in the United States District Court for the Eastern District of Kentucky on three counts of possession of marijuana with intent to distribute, 21 USC § 841(a)(1). He contends that the conviction should be reversed because of the failure to suppress illegally seized evidence, for which an adequate chain of custody was not established; failure of the district court to strike a duplicitious indictment; and personal

*The Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

bias and prejudice on the part of the trial judge in sentencing him to a maximum sentence on all three counts.

Appellant was arrested on October 27, 1981, subsequent to a search of his farm property in a rural area of Owen County, Kentucky, by the Kentucky State Police, pursuant to a search warrant issued by a State Judge of that county. The warrant had been issued sometime less than an hour prior to the search upon the application and sworn affidavit of Detective Brian Finney of the Kentucky State Police. In his affidavit, Finney attests to having received information from an informer that appellant had in his house a "large quantity of marijuana" and that Smith had advised the informer that he had in his possession a large quantity of marijuana for sale some six days before the search and seizure being challenged. Finney further attests in his affidavit for a search warrant that he had a conversation with Trooper Dennis Sharron of tke Kentucky State Police, who advised him that a quantity of marijuana was being cultivated on appellant's property. There was also a statement by Finney that he and Detective Ben Hadley of the Kentucky State Police had gone to appellant's property and requested him to sign a "consent to search" form.

Based on Finney's affidavit, an Owen County Judge found probable cause to issue a warrant for the search of a house and two barns, as well as all vehicles, on appellant's property for marijuana. The warrant was executed by Detective Hadley, who had served it together with several officers including State Trooper

Downey, who had apparently remained at appellant's property after Smith's refusal to consent to a search, while the warrant was obtained by Detective Finney. According to the execution portion of the warrant, the following marijuana was seized:

> Approximately 500 lbs. in barn.
> Approximately 4 lbs. in trunk of car.
> Approximately 12 lbs. in camper.

An indictment, charging appellant with three counts of possession with intent to distribute a Schedule I controlled substance followed the seizure of marijuana and arrest of Smith; all three counts charged him with committing the offense "on or about October 27, 1981, in Owen County, Kentucky." Each of the three counts were essentially the same except that the first count charged Smith with possession with the intent to distribute 660 lbs., more or less, of marijuana; the second count, with possession and intent to distribute 4 lbs., more or less, of marijuana, and the third count charged him with possession with intent to distribute 12 lbs., more or less, of marijuana.

At a pretrial hearing on a motion to suppress, appellant contended that the officers illegally entered upon his property before seeking the warrant, that the

[1]Finney testified that he prepared three quarters of the affidavit in his police vehicle as Hadley drove them to the courthouse at Owenton, Kentucky, for the warrant. Hadley testified that he observed Finney write some or all of the affidavit in the courthouse.

evidence later seized pursuant to the warrant was the fruit of the initial illegal entry; that the affidavit on which the warrant was based was false; and that the informant's identity should be made known to enable him to be examined. A conflict regarding the location where Finney's affidavit was actually written,[1] and the exact timing of the sequence of events on October 27, 1981 was claimed by appellant. The following testimony by Trooper Sharron in his direct examination by appellant's attorney took place:

> Q. I take it you do know S. J. Smith, do you not?
>
> A. No, sir.
>
> Q. You do know S. J. Smith?
>
> A. No, sir.
>
> Q. Have you ever, to your knowledge, before October 27, 1981, been on property belonging to Mr. S. J. Smith?
>
> A. No, sir.
>
> Q. Were you on Mr. Smith's property on October 27, 1981?
>
> A. No, sir.

The government attorney posed no questions to Trooper Sharron.

Finney had previously testified as he set out in this affidavit that Trooper Sharron had advised him about cultivation of marijuana on appellant's property.

After considering the evidence adduced, the district court upheld the search warrant as valid and refused to suppress the evidence. Appellant was subsequently convicted at trial and was sentenced to three concurrent 5-year terms, as well as a special parole term. At sentencing, both the Assistant U. S. Attorney and the trial judge made strong statements about the kind of activity Smith was engaged in, and that severe punishment was indicated, making reference to information beyond the scope of the trial itself.

The questions presented on this appeal are:

1. Was the warrant illegal because at least part of the sworn testimony which constituted the basis for issuance indicated a conflict as to information given by Trooper Sharron, and because the district court did not require revelation of the identity of the claimed reliable informant?

2. Were the indictment's three separate counts for possession of marijuana found on appellant's farm in the same search on the same day proper?

3. Was the trial judge's conduct at sentencing, and the punishment rendered so severe, to require a remand?

The application for the warrant was sufficient on its face to authorize the issuance of the search warrant of Smith's property. The officer's affidavit facially met the requirements of substantiation with respect to information provided by a confidential informant.

See Spinelli v. *United States*, 393 U.S. 410 (1969); *Aguillar* v. *Texas*, 378 U.S. 108 (1964). The state judge who issued the warrant relied on information, however, which proved to have been at least in part mistaken or erroneous, particularly as to information furnished the affiant by his fellow officer Sharron. Under the rule of *Franks* v. *Delaware*, 438 U.S. 154 (1978), the veracity of an affiant in a warrant application may be challenged, and under certain circumstances, a hearing need be held to determine reliability of the affidavit.

> In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and with the affidavit's false materials set to one side, the affidavit's remaining contents is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 156.

> Suppression is required, the Court held only when the false data is material to the finding of probable cause. Thus, after *Franks*, the proper approach for a reviewing court is to ascertain whether, setting aside the false material, the remainder of the affidavit establishes probable cause.

United States v. *Korman*, 614 F.2d 541, 551 (Merritt, J. dissenting) (6th Cir. 1980).

In the instant case, even if the information allegedly received from Trooper Sharron is excluded, probable cause still existed on the basis of the information allegedly received from the confidential informer, for the warrant to issue. Although Finney's credibility was put in doubt to some degree when the testimony at the suppression hearing revealed that he and Trooper Sharron had apparently not communicated regarding appellant's marijuana-related activity, the remainder of Finney's affidavit, based on personal observation and information from an alleged reliable informer was sufficient to authorize the warrant. *Franks, supra*, would not require that the district court necessarily take further steps to insure the veracity of the remaining portion of the affidavit and require the government to reveal the informer's identity. *See United States* v. *Manley*, 632 F.2d 978, 986 (2d Cir. 1980).[2]

It does not appear from the record in this case that perjury or reckless regard for the truth was established by appellant with respect to the affiant Finney, who did, after all, follow required procedures in order to obtain court authority for the search that developed large quantities of marijuana on Smith's

[2]A district court may make a determination as to the nature and extent of an *in camera* proceeding deemed appropriate under the circumstances of any given case. In this case, for example, it would have been helpful for an affidavit to have been submitted by the alleged informer stating that he had provided information to Finney regarding appellant.

farm. Under the rationale of *U. S.* v. *Oliver*, 686 F.2d 356 (6th Cir. 1982 en banc)[1] an open field observaion of marijuana actually grown or harvested, may be justification for a search to locate contraband on farm property. There is no Fourth Amendment protection in open fields on Smith's property according to *Oliver, supra. See Hester* v. *U. S.*, 265 U.S. 57 (1924); *U. S.* v. *Hassell*, 336 F.2d 684 (6th Cir. 1964). Appellant did not carry his burden in this case to establish a basis for suppression even if a part of Finney's affidavit is disregarded. While an *in camera* procedure to insure the existence of a reliable informant might have been desirable in this case, it was not reversible error in any event under the circumstances not to have required the government to identify or to produce such informant.

It would not seem anomalous to suggest that Congress intended that an offender might be charged separately for each separate cache of marijuana found at differing states of production at widely scattered places on a large parcel of farm property. We find no prejudice or prosecutorial abuse here, particularly where the major quantity was found in a barn, apparently drying after having been recently picked, and smaller processed quantities were found in separate vehicles on the farm.

---

[1]Petition for Certiorari has been granted in this case. *See* 51 LW 3553 (1-25-83).

Charging appellant with three separate counts of illegal possession with intent to distribute was not illegal under these circumstances. Whether appellant was properly charged with three counts is considered a question of statutory construction rather than a constitutional issue. *See Ladner* v. *United States*, 358 U.S. 169 (1958). The sentences on the three separate counts were concurrent and did not aggregate punishment even if all of the marijuana were deemed to be involved in one possession for purposes of distribution.

There was a sufficient chain of custody established in the proof of the case to justify introduction of marijuana at the trial.

The statements of the trial judge at sentencing do not rise to such level as to warrant resentencing. The sentence imposed was within the discretion of the trial judge and may not be disturbed on appeal.

Accordingly, since we find no merit in any of the grounds asserted in the conviction and sentencing of appellant under the circumstances noted, the judgment is affirmed.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
Clerk

* * * * * * *

FILED
MAY 18 1983
JOHN P. HEHMAN, Clerk

NO. 82-5565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

S. J. SMITH,
Defendant-Appellant.

ORDER DENYING PETITION FOR REHEARING

Before: MARTIN and WELLFORD, Circuit Judges; GILMORE, District Judge.*

No judge of the court having moved for rehearing *en banc*, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
Clerk

* * * * * * *

*The Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.